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No. 75-3

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

JAMAICA SAVINGS BANK,

Appellant,

v.

LOUIS J. LEFKOWITZ, as
Attorney General of the
State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellant Jamaica Savings Bank (the "Bank") submits this brief in opposition to Appellee's Motion to Dismiss or Affirm filed on August 15, 1975 (the "Motion"). Appellant's Jurisdictional Statement addresses those arguments advanced in the Motion which were also advanced by Appellant in the court below

The purpose of this brief is to address arguments and assertions made by Appellee here for the first time.

ARGUMENT

A. In the Motion, Appellee asserts that this case concerns an "abuse" of the Bank's allegedly "inequitable" and "superior" bargaining power to "extort" money from mortgagors (Motion, pp. 4 and 5). These rhetorical assertions are without support in the record:

The only reference in the record to which Appellee could conceivably be alluding in characterizing the use of bargaining power by the Bank is a statement by the court below that the New York legislature had perceived an "imbalance in the bargaining relationship" between banks and mortgagors generally. 390 F. Supp. at 1362 (Jurisdictional Statement, p. 10a). This is far short of a finding of extortionate power or conduct.

Moreover, Chapter 119 expressly exempts mortgage contracts which contain specific provisions to the effect that no interest will be paid on security deposits. This exemption certainly is inconsistent with a legislative premise that banks were abusing their bargaining power in order to "extort" money from mortgagors. Surely such specific contractual provisions, rather than mere silence on the subject of interest, would have been the more likely product of any abusive bargaining.

Perhaps most significantly, the Stipulation of Facts signed by both parties below states that the Bank "* * * currently is losing money on the vast majority (over 80%) of the 12,000 mortgage loans involved in this action" (Stipulation of Facts, par. 15). It seems

unlikely that a bank would "extort" itself into such a position.

B. Appellee also argues (pp. 5-6) that the mortgage contracts at issue in this case are "contracts of adhesion" and therefore are not entitled to the protection of the Contract Clause. That argument is unsupported in fact or in law:

The question whether a contract is a "contract of adhesion" is a question of fact. No such factual assertion was made by Appellee in the court below; no fact in the record below would lend any support to such a factual assertion; and no finding of fact on this subject was made by the court below.

In addition, Appellee cites no case and we know of no case in which it is stated that a "contract of adhesion" is not a contract for constitutional purposes or for any other purpose. It does not appear that relative bargaining power between banking institutions, on the one hand, and individual mortgagors, on the other hand, has changed significantly since this Court's decisions in cases such as *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935); *Treigle v. Acme Homestead Ass'n.*, 297 U.S. 189 (1936); *Veix v. Sixth Ward Building & Loan Ass'n.*, 310 U.S. 32 (1940); *Gelfert v. National City Bank*, 313 U.S. 221 (1941); and *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945). If the bargaining relationship between banks and mortgagors had resulted in mortgage contracts that were not entitled to constitutional protection, those cases could have been disposed of summarily.

The courts of the State of New York recognize and enforce mortgage contracts according to their terms. The

most recent example of such recognition and enforcement is *Ball v. Jamaica Savings Bank*, ____ A.D. 2d ____, 174 N.Y.L.J. No. 13, p. 10 (July 18, 1975) (2d Dept.), *aff'g* No. 3397/72 (Sup. Ct. Nassau Co., 1974). That case, decided after the Jurisdictional Statement was filed, involved one of the mortgage contracts at issue in this case. On the basis of *Surrey Strathmore Corp. v. Dollar Savings Bank*, 36 N.Y.2d 173 (1975) (see Jurisdictional Statement, p. 15), the Appellate Division affirmed the lower court's holding that the mortgage contract was to be enforced in accordance with its terms and created *no* fiduciary obligation on the part of the bank with respect to a security deposit made pursuant to the mortgage contract.

C. Appellee ultimately argues that a corporate entity regulated by the State has, in effect, no constitutional protection against impairment of its contracts. The decisions of this Court make clear that such an argument is without merit. In *Treigle v. Acme Homestead Ass'n., supra*, this Court said (297 U.S. at 197):

> We recognize that these [building and loan] associations, like banks and public service companies, are subject to a degree of regulation which would be unnecessary and unreasonable in the case of a purely private corporation. But laws touching building and loan associations, like those affecting banks or utility companies, must be confined to purposes reasonably connected with the public interest as distinguished from purely private rights. The legislature has no greater power to interfere with the private contracts of such corporations, or the vested rights of their stockholders as such, under the pretext of public necessity, than it would have to attempt the same ends in the case of a private corporation. Though

> the obligations of contracts must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive. [Footnotes omitted.]

Contracts of a regulated corporation, like those of any other person, may be altered by the State where a vital public interest so requires. *Veix v. Sixth Ward Building & Loan Ass'n., supra.* But such contracts are no more subject to retroactive impairment than those made by any other person when the State's action is "directed merely toward a private right." See *Veix, supra,* 310 U.S. at 41. The re-allocation of an average of about nine dollars per year per mortgagor (which is the thrust of Chapter 119) certainly deals with only private rights.

If, as Appellee contends, there were read into each contract of a regulated company some inherent power of the State to alter it against the interest of that company, then no such alteration could be within the prohibition of the Contract Clause. (Compare Jurisdictional Statement, p. 8). A case involving such an alteration would be automatically decided in favor of the State and would not evoke detailed analysis of the relationship between the Contract Clause and the police power of the State. That Appellee's contention is not the true state of the law is clear from the many decisions of this Court where just such detailed analyses were made in cases involving contracts of regulated banking institutions. See, *e.g., Home Building & Loan Ass'n. v. Blaisdell, supra; W. B. Worthen Co. v. Kavanaugh, supra; Treigle v. Acme Homestead Ass'n.,*

supra; Veix v. Sixth Ward Building & Loan Ass'n., supra; Gelfert v. National City Bank, supra; East New York Savings Bank v. Hahn, supra.

The cases cited by Appellee in support of his unusual concept of regulatory power do not support it. Those cases fall into three broad categories, each of which is inapplicable to the case at bar:

1. Decisions upholding *prospective* regulations: *California State Automobile Ass'n. v. Maloney*, 341 U.S. 105 (1951); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914); *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908).

2. Decisions where this Court has justified the impairment for reasons of *vital public interest: Stephenson v. Binford*, 287 U.S. 251 (1932); *Sproles v. Binford*, 286 U.S. 274 (1932); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U.S. 372 (1919); *Manigault v. Springs*, 199 U.S. 473 (1905).

3. Decisions where this Court has found that there was *no contract* to be impaired: *Dodge v. Board of Education*, 302 U.S. 74 (1937) (statutory grant of annuity held not to create a contract of employment); *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307 (1886) (grant of railroad charter held not to be contractual renunciation of state's right to regulate railroad rates).*

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*Appellee also cites a substantive due process case, *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and an eminent domain case, *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897).

CONCLUSION

The Motion substantiates Appellant's view set forth in the Jurisdictional Statement that, if the decision of the court below is allowed to stand, there will be no remaining basis on which to find that an impairment of a contract by a state legislature violates the Contract Clause. The alteration of private rights among debtors and creditors, urged by Appellee to be permissible even in the absence of an overriding state interest, was precisely what the Framers sought to prohibit by means of the Contract Clause. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819); *Home Building & Loan Ass'n. v. Blaisdell, supra.*

The motion to dismiss or affirm should therefore be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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